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SUPREME COURT OF THE UNITED STATES

October Term 1946

No. 534

LOUIS DABNEY SMITH, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PETITIONER'S REPLY
to Brief in Opposition

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MAY IT PLEASE THE COURT:

There was absolutely no question of fact as to whether petitioner did in fact furnish new oral information to the local board. The memorandum of additional proceedings appearing on the questionnaire (Government's Exhibit 2 [8]*) showed that on May 25, 1943, there was an extended hearing, at which petitioner appeared and gave evidence. Moreover, the chairman of the local board testified that the board "gave him as long a hearing as it was possible to give him." [29] While it is true that the chairman of the local board said he did not remember about Smith stating that he would quit college, the fact is that the chairman did not

*Figures in brackets [] denote pages of the printed transcript of record.

remember anything about the contents of the file. His whole testimony in reference to the case was that he did not "remember anything about that at this present moment". He relied entirely upon the record, saying, "The records are here." [30, 32]

After Smith had finished his testimony and the defendant rested his case, the Government did not attempt to contradict any of the testimony of petitioner about the new oral evidence he gave at the hearing. That evidence remains undisputed. [132-142]

The records of the draft board and the testimony of the Government's witnesses establish that there was an extended hearing at which evidence was received and considered. This fact is considered by the Government.

The fact that the Government does not believe that Smith told the board what he said he told them does not raise an issue of fact as to whether he had a hearing at which evidence was given, received and considered. The chairman admitted that the board considered what Smith had to say while he was before the board. [29] In view of the Government's failure to offer any evidence whatever to contradict what Smith stated, this should be taken as a confession that what he did state was true. "The rule invoked, it seems to us, ought not to be applied when the fact testified to is one which the opposing party is able, as in the case just referred to, to introduce testimony to contradict, and fails to do so." *Missouri K. & T. Ry.* v. *Stone,* 1910, 58 Tex. Civ. App. 480, 125 S. W. 587.

It has been held that a liberal presumption ought to be indulged in favor of the one party where the other party fails to produce evidence. (*Wetmore* v. *Rymer,* 169 U. S. 115) It is well settled that if a party fails to produce the testimony of available witnesses on a material issue, it may be inferred that the testimony of the witness, if presented, would be adverse to the party who fails to call the witness.

Mammoth Oil Co. v. *United States,* 275 U. S. 13; *Graves* v. *United States,* 150 U. S. 118; *Culbertson* v. *The Southern Belle,* 18 How. (U. S.) 584; *The New York,* 3 Wheat. (U. S.) 54; *Stocker* v. *Boston & M. R. Co.,* 84 N. H. 377; *Bethlehem Steel Co.* v. *N. L. R. B.,* 74 App. D. C. 52, 120 F. 2d 641; *Tully* v. *Fitchburgh R. Co.,* 1883, 134 Mass. 499.

The Government argues extensively that the veracity of Smith's testimony concerning the May 25 hearing is drawn in issue because of his failure to raise this point of procedural law in his appeal to the board of appeal, in his petition for reopening of the classification, in his petition for writ of habeas corpus (*Smith* v. *Richart,* 53 F. Supp. 582), and upon the trial of his first indictment. (*Smith* v. *United States,* 148 F. 2d 288)

Concerning Smith's omitting to mention in the appeal the violation of the Regulations by the local board by its failure to reduce to writing the evidence upon his personal appearance, and request for reopening of the case before the local board, the answer is plain and simple. Smith was a layman. He was not familiar with the Regulations that place the duty upon the local board. His omitting to complain about this to the local board did not constitute a waiver of the duty of the board to comply with the law. The duty was upon the board to comply with the Regulations. The board's failure thus to comply cannot be cured by the ignorance of the registrant-petitioner. While ignorance of the law may excuse the petitioner, his ignorance does not relieve the board whose obligation it was to know the law governing its duties under the Regulations with respect to preparation of the record upon appeal. It is mandatory for a federal court to cause the testimony of a case to be recorded by the stenographer. Certainly no one would have the audacity to argue that an uninformed defendant, not represented by counsel, waives his right to have the testimony and proceedings recorded and tran-

scribed for use upon appeal purely because he was unaware of the law and omitted to complain about it at the time.

Smith was unaware that the law required the board to reduce the oral testimony to writing until he was advised by his counsel for the first time upon preparation for the trial in the court below under the present indictment.

The court of appeals held that Smith's omitting to make mention of the violation of the Regulations in his appeal or in his request for reconsideration could not be taken as grounds for holding that he did not submit evidence at the hearing. [349-350] It was merely a privilege that Smith had to make mention of this fact upon appeal. There was no duty imposed upon him to do so, especially in view of his ignorance of the Regulations and the law.

Smith's omitting to make mention of this matter in previous hearings in the federal district court at Columbia, South Carolina, is also satisfactorily explained. The habeas corpus case styled *Smith* v. *Richart* (53 F. Supp. 582) was disposed of upon the decision of this court in *Billings* v. *Truesdell,* 321 U. S. 542. *Smith* v. *United States,* 148 F. 2d 288. Upon the trial of the first indictment in the district court, following Smith's release on the writ of habeas corpus, the trial court excluded all evidence with regard to the draft board action and forbade Smith to give any testimony whatever with respect to the alleged illegality of the draft board action. That ruling of the trial court upon that trial was erroneously based upon the *Falbo* decision. (320 U. S. 549) Because there the trial court had rejected proper evidence this court reversed the judgment rendered against Smith under the first indictment. *Smith* v. *United States,* 327 U. S. 114. Compare *United States* ex rel. *Kulick* v. *Kennedy* (CCA-2) — F. 2d —, decided October 29, 1946.

The first time that Smith really ever had a chance to extensively and adequately litigate the illegality of the administrative action was in the trial of the second indict-

ment in this case in the court below. There the matter was timely raised. Although now the Government argues exhaustively that the fact that this was not raised until the most recent trial of this case in the district court justifies this court in concluding that Smith testified falsely about the evidence he offered, it should be remembered that both the United States Attorney and Mr. Shapiro of the Department of Justice, who now makes this argument, did not question Louis Dabney Smith in any manner whatever about his having omitted to testify as to these facts on any former trial. Mr. Shapiro appeared and sat with the United States Attorney in the trial of this case in the district court. He also made an extensive argument. [44-48] The court heard him upon the law as to the scope of review of the draft board determination in this case in the trial court. [45-48] If Smith were lying about this and if the Government were sincere about the want of veracity of the petitioner in this case as to what took place at the named personal appearance, it seems that when during the trial they discerned Smith's omitting to testify on that subject the attorneys for the Government would have cross-examined Smith about this matter. That they wholly failed to do. Their failure to examine and assail the veracity of Smith about this matter in the district court should be taken as a confession on the part of the Government that Smith's testimony in this respect was true. (See the cross-examination of Smith [159-186]; note that the Government's attorney nowhere even intimates that Smith was lying.) Not one single question was asked Smith by the United States Attorney on this matter which the Government now complains about. It is highly unfair for the Government to assail the credibility and veracity of a witness for the first time in the Supreme Court of the United States when there is nothing in the record upon which to base the attempted impeachment of the witness' testimony. This is especially

reprehensible in view of the fact that the United States District Attorney who heard his testimony in the several trials referred to failed to cross-examine Smith about the matter.

The Government's attorneys knew that Smith had testified in two former trials while they heard him give testimony about this in the district court. Why did they not question him about the matter at the time, instead of attempting to impeach him for the first time in the Supreme Court of the United States?

The Government says that this question can be fully explored on the retrial of the case by questioning members of the local board and Smith. The evidence is obviously fully developed. If the board members had testimony to contradict Smith, why didn't the Government call the members of the local board to the witness stand to contradict Smith? As appears from the above cited cases, the failure on the part of the Government to contradict the testimony of Smith can rightly be taken as a confession that if such members had been called their testimony would have corroborated the testimony of Smith rather than impeach it, as the Government now is wont to have this court believe.

Yet the Government now has the audacity to suggest that upon another trial the testimony of the board members may contradict Smith's testimony. That the Government does by inferentially stating, "If petitioner's story is true, it undoubtedly will find support in the testimony of these persons." (Br. p. 18) Certainly that weak, equivocal statement of the Government does not overcome the rule of law with reference to the presumption about the failure to call witnesses obviously within the control of the Government. Smith should not be put to another trial in the district court solely because the board members failed to testify on this matter in the court below.

The mistakes of the Government in its trial of cases

should not be made the basis of remanding cases to trial courts for retrial, when upon the record it is the duty of the courts to reverse judgments and order the indictments dismissed.

In this case it plainly appears that the evidence is fully developed and that no justice can be gained by ordering a new trial in the district court upon this issue.

WHEREFORE petitioner prays that the writ of certiorari be granted and that he be given an opportunity to argue whether, in the circumstances of this case, the judgment should be reversed and the indictment ordered dismissed rather than that a new trial be ordered.

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